FILE COPY

Office Supreme
FILE
MAY 9
CHARLES ELMO

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 81

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

By WM. A. VINSON,
CLYDE A. SWEETON,
Solicitors for Employers' Liability Assurance Corporation, Ltd., of London, England.
VINSON, ELKINS, SWEETON & WEEMS,
Of Counsel.

(34,194)

CONTENTS OF BRIEF.

	Page
First proposition or specification of error	2
Statement from record under first proposition or specification of error	2
Authorities relied upon to support first proposition or specification of error	4
Argument under first proposition or specification of error	5
Second proposition or specification of error	10
Statement from record under second proposition or specification of error	10
Authorities relied upon to support second proposition or specification of error	12
Argument under second proposition or specification of error	13

List of Authorities Cited in Brief.

Atlantic Transport Company v. M. Imbrovek, 234 U. S., 59; 58 L. Ed., 1208	5
Alpert v. Powers et al., 119 N. E., 230	13
Bell City, etc., Co. v. Industrial Commission, 192 N. W., 1010.	12
Bolen-Darnell Coal Co. v. Hicks, 190 Fed., 721	12
Frank v. Chicago, M. & St. P. Railway Co., 207 N. W., 89	12
Grensberg v. Burroughs Adding Machine Company, 170 N. W., 15	12
International Stevedoring Co. v. Haverty, 272 U. S., 51; 71 L. Ed., 157	5
Joske v. Irvine, 44 S. W., 1063	12
Knickerbocker Ice Company v. Stewart, 253 U. S., 156; 64 L. Ed., 835	5
Libby et al. v. Industrial Commission, 157 N. E., 168	13
Madison Coal Corporation v. Industrial Commission, 150 N. E., 45	13
Manning v. Mutual Life Insurance Company, 100 U. S., 696; 25 L. Ed., 761	12
Midland Valley Railroad Company v. Fulgham, 181 Fed., 91	12
Missouri, K. & T. Ry. Co. v. Foreman, 174 Fed., 383	12
Mt. Olive, etc., Co. v. Industrial Commission, 151 N. E., 592	13
Mussel v. Foundation Company, 274 U. S., 430; 71 L. Ed., 1135	5

Page

New England, etc., Company v. Dunham, 78 U. S., 27; 20 L. Ed., 98 5
Northern Coal Company v. Strand, 278 U. S., 142 4
Northern Pacific Steamship Co. v. Hall Brothers Marine, etc., Co., 249 U. S., 125 5
Standard Oil Company v. Industrial Commission (Supreme Court of Illinois), 153 N. E., 660 12
Southern Pacific Company v. Jensen, 244 U. S., 205 4
Southern Railway Company v. Railroad Commission, 236 U. S., 437 5
Stovall v. Markham, 210 S. W., 323 12
Texas Employers' Insurance Assn. v. Herring, 280 S. W., 740 .. 12
In re United States Fidelity & Guaranty Co., 145 Fed., 273 12
United States v. Ross, 92 U. S., 282 12
Washington v. Dawson & Company, 264 U. S., 226 5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 885

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States of America:

The Employers' Liability Assurance Corporation, Ltd., of London, England, in support of its petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit in the case of Employers' Liability Assurance Corporation, Ltd., of London, England, Appellant, *versus* Mrs. Myrtis Cook *et al.*, Appellees, No.

5395 on the docket of that Court, respectfully submits the following brief:

First Proposition.

Where an employee, while engaged in the performance of his contract of employment, is injured in the hold of a vessel engaged in interstate commerce, and while said vessel is anchored in navigable waters of the United States, the Texas Workmen's Compensation Act is inapplicable and cannot be enforced and applied against compensation insurer in a court at law, because the said act is in conflict with and repugnant to Article 3, Section 2, of the Constitution, extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

STATEMENT.

It was affirmatively alleged by appellees that the deceased sustained the injury complained of while he was assisting in unloading a vessel anchored in the Ship Channel at Houston, Texas, in navigable waters of the United States (R. 3 and 4). The alleged injury to deceased occurred while he was in the hold of the vessel "Lake Gorian," unloading automobile parts (R. 28 and 29), the vessel lying in navigable waters of the United States.

It was shown without dispute that the Ford Motor Company owned two ships at the time in question which it used in its regular business, and during the time of such ownership it engaged in commerce upon

the high seas. It was further shown that all employees, including the deceased, signed an employment slip agreeing to do any kind of work required of him by the Ford Motor Company, and that in unloading the boat, "Lake Gorian," the deceased was performing services contemplated and provided by his contract of employment. These ships were in charge of captains and mates who had charge of the ships while in Houston (R. 30, 36 and 37).

The policy of Workmen's Compensation Insurance issued by petitioner to the Ford Motor Company, the employer of deceased, was limited to such employees as were within the scope of the Texas Workmen's Compensation Act (R. 34).

Part 1, Section 3, of the Texas Workmen's Compensation Act provides:

> "The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for. All compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and

> no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void (Acts 1917, p. 269; Acts 1923, p. 385)."

The Act is elective. Part 1, Section 3*a*.

The common-law defenses, contributory negligence, fellow-servants and assumed risk, are taken away by the Act. Part 1, Section 1.

It also describes a schedule of weekly payment for employee or beneficiary and provides for the Board to pass upon the claim and an ultimate right to proceed in court. Subscriber's employees do not contribute to the necessary cost of such protection. They are presumed to accept the plan and to waive all right to recover damages at common law or under any statute unless they give definite written notice to the contrary.

Part 4, Section I, of the Texas Workmen's Compensation Act defines "employee" as follows:

> "Employee shall mean every person in the service of another under any contract of hire, express or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course, business, trade, occupation or profession of his employer."

AUTHORITIES.

Northern Coal Company *v.* Strand, 278 U. S. 142.

Southern Pacific Company *v.* Jensen, 244 U. S. 205, 61 L. Ed. 1098.

Atlantic Transport Company *v.* M. Imbrovek, 234 U. S. 59, 58 L. Ed. 1208.

Mussel *v.* Foundation Company, 274 U. S. 430, 71 L. Ed. 1135.

International Stevedoring Co. *v.* Haverty, 272 U. S. 51, 71 L. Ed. 157.

Washington *v.* Dawson & Company, 264 U. S. 226, 68 L. Ed. 652.

Knickerbocker Ice Company *v.* Stewart, 253 U. S. 156, 64 L. Ed. 835.

New England, etc., Company *v.* Dunham, 78 U. S. 27, (11 Wallace 1, 27); 20 L. Ed. 98.

North Pacific Steamship Company *v.* Hall Brothers Marine Railway & Ship Building Company, 249 U. S. 125, 63 L. Ed. 510.

Southern Railway Company *v.* Railroad Commission, 236 U. S. 437, 59 L. Ed. 661.

Argument.

We respectfully submit that there is no distinction between the case at bar and the case of Northern Coal Company *v.* Strand, *supra*, the latest decision by the Supreme Court dealing with Workmen's Compensation Acts. In that case Strand's employment contemplated labor both upon the land and the water, and when killed, he was performing services on a vessel lying in navigable waters. The facts showed that he spent about two per cent (2%) of his time unloading vessels. It was contended in that case, as by the Circuit Court of Appeals in the case at bar, that as he spent so little of his time unloading ships, it was a

matter of pure local concern over which the State of Wisconsin could legislate. The Supreme Court in reversing judgment of the lower court held:

> "The unloading of a ship is not a matter of pure local concern. It has direct relation to commerce and navigation and uniform rules in respect thereto are essential. The fact that Strand worked for a major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when his accident occurred."

The policy issued by petitioner in the case at bar expressly limited its application to such employees as were within the scope of the Texas Workmen's Compensation Act. Therefore, it could not be held liable under the Texas Law and under its policy for accidental death to a seaman engaged in interstate commerce. It follows, we think, that it cannot be successfully contended that the Company consciously contracted with its employees pursuant to the Texas Workmen's Compensation Act in so far as their duties and services were to be performed on vessels in navigable waters.

The employee's contract of employment unquestionably contemplated the performance of services upon the vessels of his employer. Therefore, it was a maritime contract.

The Supreme Court in the case of New England, etc., Company *v.* Dunham, 11 Wallace, 1 at 26, said:

> "Secondly, as to *contracts*, it has been equally well settled that the English rule which con-

> cedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract having reference to maritime service or maritime transactions."

The Honorable Circuit Court of Appeals reasons that because the injury to the employee in the case at bar was not caused by tort, but was a pure accident and there was no relief in admiralty, that the State of Texas could properly and legally legislate upon the subject. We submit this position is not sound. Congress is given exclusive jurisdiction over all matters of admiralty and admiralty jurisdiction. Its failure to make provision in admiralty for accidental injuries does not leave the field of legislation in that respect open to the States. Southern Pacific Company *v.* Jensen, *supra.*

In the case of Southern Railway Company *v.* Railroad Commission, *supra,* the Supreme Court said:

> "The test, however, is not whether the State Legislation is in conflict with the details of the Federal Law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had asserted its exclusive control."

The cases of Southern Pacific *v.* Jensen, *supra,* and Northern Coal Company *v.* Strand, *supra,* did not involve torts, but accidents.

The Honorable Circuit Court of Appeals attempts to distinguish the case at bar from the case of Northern Coal Company *v.* Strand on the ground that the Wisconsin Workmen's Compensation Act is compulsory and the Texas Workmen's Compensation Act is elective. We believe the reasoning of the Court in reaching this conclusion is fallacious. Congress being given by the Constitution exclusive jurisdiction to legislate with respect to all cases of admiralty, and it having referred the exclusive jurisdiction in such cases to courts of admiralty, parties cannot by consent confer jurisdiction upon any other tribunal.

We invite the court's attention to the case of Peters *v.* Veasey, 251 U. S. 121, 64 L. Ed. 180, wherein the Supreme Court held an optional compensation act to be inapplicable to an injury on maritime waters in the course of maritime employment.

The Supreme Courts of Texas and Massachusetts have expressly held there is no distinction in cases under compulsory and elective compensation statutes.

In the case of Bill *vs.* Surety Casualty Company, 267 S. W. 531 (writ of error refused by the Supreme Court of Texas), the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas quoted the Supreme Court of Massachusetts in Duart *v.* Simmons, 121 N. E., page 10, as follows:

> "The ground of the Jensen decision as we understand it is that the kind of legislation represented by Workmen's Compensation Acts is beyond the jurisdiction of the states so far as it relates to admiralty and maritime affairs.

> The reasoning of that decision seems to us to apply equally to an elective as to a compulsory Workmen's Compensation Act. Consent of parties cannot confer jurisdiction. A statute which in its nature is outside the jurisdiction of the state, because within the exclusive domain of the federal government, cannot confer rights or be a bar to the enforcement of common-law obligations."

Under the Texas Workmen's Compensation Act, if an employer may legally become a subscriber and does not avail himself of such privilege, his common-law defenses are denied him. The act is compulsory to this extent and for that reason, if no other, the distinction made by the Circuit Court of Appeals should not be upheld.

The Circuit Court of Appeals cites with approval the case of Grant Smith-Porter Ship Company *v.* Rohde, 257 U. S. 469. That case is inapplicable to the case at bar for the reason that the injured party was performing services on an incomplete vessel in navigable waters. The uniform decisions of the Supreme Court are to the effect that services performed and to be performed on an incompleted vessel are non-maritime. Mr. Justice McReynolds, in speaking for the Supreme Court in the Rohde case, said:

> "The contract for constructing the 'Ahala' was non-maritime and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce."

Neither is the case of Millers' Indemnity Underwriters *v.* Braud, 207 U. S. 59, relied upon by the Circuit Court, in point. In the Braud case the employee went down into the water from a small barge for the purpose of sawing off timbers from an abandoned set of ways once used for launching ships, and while under the water the air supply failed and he died of suffocation. He was certainly not engaged in navigation nor interstate commerce, and, as we understand the decision, it was based upon the theory that the timbers were part of the shore docks.

Second Proposition.

Where beneficiaries of a deceased employee in a suit under the Texas Workmen's Compensation Act claimed that the primary cause of deceased's death was secondary anemia, and that the contributing cause thereof was thrombosis of the mesenteric veins following a strain in the course of his employment, the burden was upon them to show by direct and positive evidence, either that deceased strained himself or sustained a thrombosis of the mesenteric veins, and as there is no direct and positive evidence that deceased either strained himself or sustained a thrombosis of the mesenteric veins, the judgment is contrary to the law and evidence in that it is permitting a judgment to stand by basing a presumption upon a presumption.

STATEMENT.

On January 25th, deceased, together with two other employees, were unloading various automobile parts

ranging in weight from one hundred to two hundred fifty (100 to 250) pounds, which was heavy, straining work. After they had been working in the hold of the vessel about two hours, deceased complained of his back. These witnesses did not see the deceased suffer any character of injury, and he never told them he injured himself (R. 28, 29, 31, 42, 43 and 60).

Dr. James A. Hill examined him on February 10th, 1927, and found a slight mass of varicose veins along the left cord and upper portion of the scrotum, and on February 11th he was operated on by Dr. C. V. Barnes for varicocele (R. 45, 69 and 70). The deceased gradually grew worse following the operation for varicocele until his death, May 28th, 1928 (R. 40).

The varicocele condition and operation did not contribute in any way to the death of deceased (R. 54 to 56, 63, 69 and 70).

The primary cause of deceased's death was secondary anemia, and his physician gave his opinion that the contributing cause was thrombosis (blood clot) in the mesenteric veins following a strain while working for the Ford Motor Company (pages 46 and 47, Brief). There was no positive testimony that deceased did sustain a thrombosis. The hospital chart indicated that deceased's temperature became elevated after the operation which indicated that infection had set in (R. 51 and 52).

There was testimony that thrombosis usually follows an organic condition, and that after a thrombosis of the mexenteric veins forms, a man, without surgical intervention, would live from two to four days;

that secondary anemia did not usually follow thrombosis (R. 64 and 65). Deceased was not suffering from thrombosis at the time he was examined on February 10th by Dr. James A. Hill (R. 70). The trial court charged the jury that the case was one purely of circumstantial evidence (R. 76).

AUTHORITIES.

Bolen-Darnell Coal Co. *v.* Hicks, 190 Fed. 721.

Texas Employers' Insurance Ass'n *v.* Herring, 280 S. W. 740.

In re United States Fidelity & Guaranty Co., 145 Fed 273.

United States *v.* Ross, 92 U. S. 282, 23 L. Ed., 708.

Manning *v.* Mutual Life Insurance Company, 100 U. S. 696, 25 L. Ed. 761.

Midland Valley Railroad Company *v.* Fulgham, 181 Fed. 91.

Missouri, K. & T. Ry. Co. *v.* Foreman, 174 Fed. 383.

Joske *v.* Irvine, 44 S. W. 1063.

Stovall *v.* Markham, 210 S. W. 323.

Frank *v.* Chicago, M. & St. P. Railway Co., 207 N. W. 89.

Bell City, etc., Co., *v.* Industrial Commission, 192 N. W. 1010.

Grensberg *v.* Burroughs Adding Machine Company, 170 N. W. 15.

Standard Oil Company *v.* Industrial Commission (Supreme Court of Illinois), 153 N. E. 660.

Madison Coal Corporation *v.* Industrial Commission, 150 N. E. 645.

Libby *et al. v.* Industrial Commission, 157 N. E. 168.

Mt. Olive, etc., Co. *v.* Industrial Commission, 151 N. E. 592.

Alpert *v.* Powers *et al.*, 119 N. E. 230.

Argument.

The Supreme Court, in the case of United States *v.* Hass, 92 U. S. 282, 23 L. Ed. 708, lays down the following rule:

> "No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., page 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and the evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

The Supreme Court of Texas, in the case of Joske *v.* Irvine, 44 S. W. 1063, overturned the scintilla-evidence doctrine in this state and clearly announced the rule that no inference of fact can be drawn from premises that are uncertain. The court in the course of the opinion said:

> "Facts upon which an inference may legitimately rest must be established by direct evidence, as if they were the facts in issue. One presumption cannot be based upon another presumption. 16 Cyc. 1051; Mo. Pac. Ry. Co. *v.* Porter, 73 Tex. 307, 11 S. W. 324. No fact or circumstance was proved in this case which justified that presumption that the pipe was placed upon the track of the railroad by any person under the control of Armour & Co."

Applying the above rules to the case at bar, it is obvious, we submit, that this case does not have any evidence to support the judgment of more than a mere scintilla.

There is no positive testimony in the record that the deceased strained himself. It may be inferred from the kind and character of work that he was doing and his previous good health that he did strain himself, but upon this legitimate presumption there must be indulged a further presumption that in straining himself he sustained thrombosis of the mesenteric veins, and upon these presumptions base the further presumption that the thrombosis of the mesenteric veins caused secondary anemia, the primary cause of the death of the deceased. By doing so, a presumption

is based upon a presumption and inferences of fact drawn from premises which are uncertain.

Respectfully submitted with prayer that judgment be reversed and cause rendered in favor of Petitioner; or, in the alternative, reversed and remanded.

CLYDE A. SWEETON,
WM. A. VINSON,
Solicitors for Employers' Liability Assurance Corporation, Ltd., of London, England.

VINSON, ELKINS, SWEETON & WEEMS,
Of Counsel.

(7340)